Supreme Court, U.S.
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No. 90-1741

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BAYERISCHE HYPOTHEKEN- UND WECHSEL- BANK AG
and
DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,
Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany, and EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Georgia

PETITIONERS' REPLY BRIEF

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Contrary to Respondents' assertion, the Order of the Superior Court of Fulton County, Georgia, and the affirmance thereof by the Supreme Court of Georgia did not rest upon any adequate and independent state grounds. Rather, the courts below necessarily either (1) ignored completely the substantial federal questions properly raised by Petitioners or (2) decided that the alienage-based discrimination mandated by the Order was not violative of the Fourteenth Amendment's guarantee of equal protection and that violation of the Treaty at issue was subordinate to the whims of the trial court. Despite Dr. Görg's protestations, the type of alienage-based discrimination found in this case is clearly prohibited by this Court's established precedent.

I. THE ORDERS BELOW DO NOT REST UPON ANY ADEQUATE AND INDEPENDENT STATE GROUNDS.

A. Petitioners Properly Raised, Presented and Pursued Their Substantial Federal Challenges Below.

The essence of Respondents' response on this issue is that because Petitioners relied on the certified transcript of the bankruptcy court trial on Dr. Görg's section 304 petition in rebutting his statement of material facts below rather than obtaining new affidavits from the same witnesses as to the same issues, therefore somehow Petitioners failed to raise their federal questions properly. However, Respondent Görg admits that Petitioners did raise the federal issues below. *See* Respondent Görg's Brief in Opposition, at 12. Nonetheless, Respondents assert that the Petitioners' use of that transcript did not comply with Georgia law and that such non-compliance provided an independent and adequate state law ground for the decisions below. These arguments are simply wrong.

First, Respondents clearly waived any possible objection to the transcript (and any other evidence) by failing to object when such evidence was submitted to the trial court. *See Chapman v. McClelland*, 248 Ga. 725 (1982); *Perry v. International Indemnity Co.*, 169 Ga. App. 818 (1984)("There is no more fundamental principle of appellate review than that preventing consideration of evidentiary objections not raised before the trial court and contained in the record on appeal.") Second, in opposition to a summary judgment motion, Georgia courts consider all papers of record, regardless of whether the papers have been formally introduced into evidence. *See Bimbo Builders v. Stubbs Properties*, 158 Ga. App. 280 (1981); *Jackson v. Couch Funeral Home*, 131 Ga. App. 695 (1974). The transcript was unquestionably properly before the courts below, Petitioners having complied with applicable procedural requirements.

B. Comity Was Not And Could Not Be An Adequate and Independent Basis For The Decisions Below.

Seeking another out, Respondents argue strenuously that the trial court based its Order on recognition of German court orders under the doctrine of comity, that being an independent and adequate state ground. This position is obviously fanciful because it ignores two critical but quite obviously contrary facts from the record below. First, neither the trial court nor the Georgia Supreme Court makes any mention whatsoever of comity or the German court orders. Second, and more significant, the United States Bankruptcy Court for the Northern District of Georgia, in the trial of Dr. Görg's section 304 petition (the transcript of which was properly submitted to the trial court herein and the rulings of which are attached to the Petition) found that considerations of comity would dictate the opposite result from that reached by the Order below. The bankruptcy court found that German law recognized the right of the

Georgia courts to administer estate property located in Georgia in accordance with Georgia law and that Dr. Görg's authority was thus circumscribed by the laws of his own country and by the terms of the very order appointing him as Trustee.

Because the Georgia Supreme Court decided this case without a written opinion setting forth the basis for its decision, and because Petitioners raised federal issues before that court, that decision is one that "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and is therefore subject to review by this Court. *Michigan v. Long,* 463 U.S. 1032, 1040 (1983). As this Court made clear in *Long*, where it is unclear whether a state court's decision rests upon state or federal grounds and both have been raised, there is a presumption that the federal question was necessary to the decision and thus this Court's review is appropriate. *Id.* This Court should not follow Dr. Görg's musings as to the basis for the Georgia Supreme Court's decision, but rather should assume that the federal questions raised constituted a basis for that decision.

II. THE TRIAL COURT'S ORDER MANDATES ALIENAGE-BASED DISCRIMINATION WHICH INFRINGES PETITIONERS' RIGHTS TO EQUAL PROTECTION.

The trial court's Order discriminates against Petitioners (and others similarly situated) based solely on the fact that Petitioners are German nationals. That basis is explicit and intentional; it is expressed by the very terms of the Order, which single out German nationals to be excluded from the statutory distribution scheme of O.C.G.A. § 53-7-91. The trial court stated: "The Administrator is directed to pay in full all valid claims filed with the Administrator ... except that the Administrator shall not pay any amounts on the following claims: [lists four German claimants]." As

this Court made clear in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977), "[w]hen there has been proof that a discriminatory purpose has been a motivating factor in the decision, ... judicial deference is no longer justified." The proof of the trial court's intent is the express language of the Order. No more showing is required. This blatant and embarrassing abuse should be reversed with emphasis.

Respectfully submitted,

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